

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELVIN MAREL DURAN,

Defendant and Appellant.

B298071

(Los Angeles County
Super. Ct. No. BA068055)

APPEAL from an order of the Superior Court of
Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Amanda V. Lopez and Charles J. Sarosy,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Elvin Marel Duran guilty of second degree murder with a finding that he personally used a firearm. Years later, he petitioned for resentencing under Penal Code¹ section 1170.95. The trial court summarily denied the petition without appointing counsel for Duran. He appeals, contending he was entitled to have counsel appointed. We reject that contention.

BACKGROUND²

In August 1992, the victim Walter Belloso accused Duran of owing him money. Demanding payment, Belloso broke a window on Duran's car and then hit him. Duran crossed the street, retrieved a gun from his car, walked back to Belloso and shot him to death as Belloso was getting into his car. At trial, Duran claimed to have shot Belloso because he was scared. Based on this evidence, a jury found Duran guilty of second degree murder with a finding he personally used a firearm under section 12022.5, subdivision (a). The trial court sentenced him to 19 years to life in prison. Our Division affirmed the judgment of conviction, rejecting Duran's sole substantive contention he was entitled to instruction on involuntary manslaughter. (*People v. Duran, supra*, B085503, at pp. 4–5.)

Thereafter, our Legislature passed Senate Bill No. 1437 (2017–2018 Reg. Sess.), which took effect January 1, 2019. That bill amended the felony-murder rule and eliminated the natural

¹ All further statutory references are to the Penal Code.

² The background is from our Division's opinion affirming Duran's judgment of conviction. (*People v. Duran* (Nov. 22, 1995, B085503) [nonpub. opn.].) The motion for judicial notice filed on October 29, 2019 is granted.

and probable consequences doctrine as it relates to murder, all to the end of ensuring that a person's sentence is commensurate with the person's criminal culpability. Based on that new law, a person convicted of murder under a felony murder or natural and probable consequences theory may petition the sentencing court for vacation of the conviction and resentencing, if certain conditions are met.

Duran petitioned for resentencing under section 1170.95. In his form petition, Duran checked boxes indicating: (1) a complaint, information or indictment had been filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine, (2) he was convicted of first or second degree murder under one of those doctrines, and (3) he could not now be convicted of first or second degree murder because of changes to sections 188 and 189. Duran also checked boxes to indicate he was not the actual killer and to request that the court appoint counsel for him during the resentencing process.

The trial court summarily denied the petition without appointing counsel for Duran. The trial court found that Duran's claims he was not the actual killer and was convicted under a felony murder or natural and probable consequences doctrines to be belied by the facts at trial, as stated in this Division's opinion affirming the judgment of conviction.

DISCUSSION

Duran's sole contention is the trial court violated his federal constitutional rights by failing to appoint counsel for him. He interprets section 1170.95 to require appointment of counsel whenever a petition contains the basic averments required by subdivision (b) of section 1170.95—even if the record of conviction

establishes that those averments are untrue.³ As we now explain, our principal task in interpreting a statute is to determine legislative intent and to give effect to the law’s purpose. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328, fn. 8 (*Verdugo*), review granted Mar. 18, 2020, S260493.) Our task leads us to conclude that the trial court properly denied the petition.

Under Senate Bill No. 1437, malice may no longer be imputed to a person based solely on the person’s participation in the crime; now, the person must have acted with malice aforethought to be convicted of murder. (§ 188; *People v. Munoz* (2019) 39 Cal.App.5th 738, 749, review granted Nov. 26, 2019, S258234.) To that end, the natural and probable consequences doctrine no longer applies to murder. And, a participant in enumerated crimes is liable under the felony-murder doctrine only if the participant was the actual killer; or with the intent to kill, aided and abetted the actual killer in commission of first degree murder; or was a major participant in the underlying felony and acted with reckless indifference to human life. (§ 189, subd. (e); see *Munoz*, at pp. 749–750.)

Senate Bill No. 1437 also added section 1170.95. “Pursuant to subdivision (a) only individuals who meet three conditions are eligible for relief: (1) the person must have been charged with

³ This issue is currently on review in *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted March 18, 2020, S260598. Specifically, the Supreme Court is considering whether superior courts may consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under section 1170.95 and when the right to appointed counsel arises under subdivision (c) of that section.

murder ‘under a theory of felony murder or murder under the natural and probable consequences doctrine,’ (2) convicted of first or second degree murder, and (3) can no longer be convicted of first or second degree murder ‘because of changes to Section 188 or 189 made effective January 1, 2019.’” (*People v. Drayton* (2020) 47 Cal.App.5th 965, 973.)

Courts of appeal have interpreted section 1170.95 to provide for multiple reviews of a petition by the trial court. (*People v. Tarkington* (2020) 49 Cal.App.5th 892; *People v. Drayton*, *supra*, 47 Cal.App.5th at p. 974; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57–58, review granted Mar. 18, 2020, S260410; *Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) Subdivision (b) of section 1170.95 describes an initial review to determine the facial sufficiency of the petition. (*Verdugo*, at p. 328.) To be facially sufficient, the petition must contain the petitioner’s declaration that the petitioner is eligible for relief according to the criteria in subdivision (a), the case number and year of conviction, and whether the petitioner is requesting appointment of counsel. (§ 1170.95, subd. (b)(1).) If the petition is missing any of this information “and cannot be readily ascertained by the court, the court may deny the petition without prejudice.” (§ 1170.95, subd. (b)(2).) This initial review amounts essentially to a ministerial review to ensure merely that the right boxes are checked.

Subdivision (c) of section 1170.95 then describes the next two levels of review. It provides, “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall

file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.”

The first sentence in subdivision (c) refers to a prebriefing, initial prima facie review to preliminarily determine a petitioner’s statutory eligibility for relief as a matter of law. (*Verdugo, supra*, 44 Cal.App.5th at p. 329.) In this step of review, the trial court determines, based upon its review of readily ascertainable information in the record of conviction and the court file, whether the petitioner is statutorily eligible for relief. (*Id.* at pp. 329–330.) The court may review the complaint, the information or indictment, the verdict form or the documentation for a negotiated plea, and the abstract of judgment. (*Ibid.*) A court of appeal opinion is part of the appellant’s record of conviction. (*Id.* at p. 333.) If these documents reveal ineligibility for relief, the trial court can dismiss the petition. (*Id.* at p. 330.)

If the record of conviction does not establish as a matter of law the petitioner’s ineligibility for resentencing, evaluation of the petition proceeds to the second prima facie review, in which “the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties’ briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief.” (*Verdugo, supra*, 44 Cal.App.5th at p. 330.) The trial court must accept as true the petitioner’s factual allegations and make a preliminary assessment regarding whether the petitioner would

be entitled to relief if the factual allegations were proved. (*Id.* at p. 328.)

We agree with those courts of appeal that interpret section 1170.95 to permit a trial court to make an initial determination whether the petitioner may be entitled to relief, without first appointing counsel. The structure and grammar of subdivision (c) of that section “indicate the Legislature intended to create a chronological sequence: first, a prima facie showing; *thereafter*, appointment of counsel for petitioner; then, briefing by the parties.” (*Verdugo, supra*, 44 Cal.App.5th at p. 332, italics added; accord, *People v. Lewis, supra*, 43 Cal.App.5th at p. 1140.) As *Verdugo* at pages 328 to 329 noted, to hold otherwise that counsel must be appointed once a petitioner files a facially sufficient petition renders subdivision (c) redundant to subdivision (b)(2).

And, where a cursory review of the record of conviction shows that the petitioner is not entitled to relief under Senate Bill No. 1437, it “‘would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous.’” (*People v. Lewis, supra*, 43 Cal.App.5th at p. 1138.) That is the case here. Per the opinion in the direct appeal, the murder involved just two people: the victim and Duran. This was not a situation in which multiple persons carried out the attack. There was no dispute at trial that Duran shot the victim, as Duran so testified. Also, the jury found true a personal gun-use allegation. Senate Bill No. 1437 affords no relief to actual killers.⁴

⁴ *People v. Offley* (2020) 48 Cal.App.5th 588, 598, held that a true finding on a personal gun use allegation under

As the actual killer, relief under section 1170.95 is unavailable to Duran, and the trial court did not violate his constitutional rights by summarily denying the petition without appointing counsel.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.

section 12022.53, subdivision (d) does not establish that the defendant acted with malice aforethought, and therefore the defendant had established a prima facie case for relief under Senate Bill No. 1437. *Offley* did not discuss that the natural and probable consequences doctrine is a theory of vicarious liability and, hence, inapplicable to actual killers.